

FILED

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MARYLAND  
(Baltimore Division)

FEB 19 2001

CLERK'S OFFICE  
U. S. BANKRUPTCY COURT  
DISTRICT OF MARYLAND  
BALTIMORE

In re:

FRANK'S NURSERY & CRAFTS, INC., et  
al.,

Debtors.

Case Nos. 01- 52415-JS THANDON 01-52416-JS  
(Chapter 11)  
(Jointly Administered)

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**MOTION FOR AN ADMINISTRATIVE ORDER PURSUANT TO  
11 U.S.C. §§ 105(A), 328 AND 331 ESTABLISHING PROCEDURES FOR  
INTERIM COMPENSATION AND REIMBURSEMENT OF PROFESSIONALS**

Frank's Nursery & Crafts, Inc. ("Frank's") and FNC Holdings, Inc. ("FNC"), the above-captioned debtors and debtors in possession herein (collectively, the "Debtors"), by counsel, file their Motion for an Administrative Order Pursuant to 11 U.S.C. §§ 105(a), 328 and 331 Establishing Procedures for Interim Compensation and Reimbursement of Professionals (the "Motion"), and in support thereof state:

**Jurisdiction**

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334, and 11 U.S.C. § 521. Venue lies properly in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157.

2. The relief sought with this Motion is based upon Sections 105(a), 328 and 331 of Title 11 of the United States Code, 11 U.S.C. §§ 101 et. seq. (the "Bankruptcy Code").

**The Chapter 11 Cases**

3. On the date hereof (the "Petition Date"), each of the Debtors filed with this Court a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtors continue

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in the possession of their respective properties and the management of their respective businesses as debtors in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

4. By motion submitted to the Court concurrently herewith, the Debtors seek entry of an order of this Court authorizing the procedural consolidation and joint administration of these cases.

#### **The Debtors and Their Business Operations**

5. Frank's, founded in 1949, operates the largest United States chain (as measured by sales) of specialty retail stores devoted to the sales of lawn and garden products. Lawn and garden products include green and flowering plants for outdoor and indoor usage, live landscape products such as trees and shrubs, fertilizers, seeds, bulbs, gardening tools and accessories, planters, watering equipment, garden statuary and furniture, wild bird food and feeders, mulches and specialty soils. Frank's also is a leading retailer of Christmas Trim-A-Tree merchandise, artificial flowers and arrangements, garden and floral crafts, and home decorative products. FNC (formerly known as General Host Corporation) is the sole shareholder of Frank's.

6. As of February 9, 2001, Frank's operated 217 retail stores in 15 states, primarily in the Mid-Atlantic, Midwest and Northeast. At that time, an additional 44 stores were being closed as part of a previously announced plan to sell under-performing store locations. In its fiscal year ending January 28, 2001, Frank's had sales of approximately \$435 million. Currently, the Debtors employ approximately 1,900 full-time and 5,000 part-time employees. As of November 5, 2000, the Debtors had total assets of approximately \$471.9 million and total debt of approximately \$338 million.

7. The Debtors' sales are seasonal. The lawn and garden revenues are concentrated principally in the Spring and, to a lesser extent, in the Fall. The Trim-A-Tree sales occur between Thanksgiving and Christmas.

8. During most of the first half of 2000, weather patterns negatively impacted lawn and garden product sales across the Debtors' principal markets. During the third quarter of 2000, the Debtors decided to close 44 under-performing stores, liquidate their inventories, and sell the closed stores owned by the Debtors. Later in 2000 it became apparent that the Debtors' Trim-A-Tree holiday season sales were below expectations, which was consistent with the general softness in sales at retailers during this period.

9. In 2001, notwithstanding excess borrowing availability under their existing bank credit facilities, the Debtors were unable to draw down sufficient funding to meet the Debtors' working capital needs because the Prepetition Lenders asserted that various conditions to borrowing had not been met. (The Prepetition Lenders, however, did provide limited funding subject to various conditions.) Also, in the relatively short period since access to their credit facilities had been curtailed, the Debtors were unable to secure additional funding to meet those working capital needs. Ultimately, the Debtors determined the most appropriate method to obtain such financing and achieve their restructuring objectives was through chapter 11 filings.

#### **The Professionals**

10. The Debtors are represented in their bankruptcy proceedings by two law firms working as co-counsel, Willkie Farr & Gallagher ("WF&G") and Whiteford, Taylor & Preston, LLP ("WT&P"). WF&G, WT&P, and such professionals as the Debtors may employ, shall hereafter be referred to collectively as the "Debtors' Professionals."

11. The Debtors anticipate that, pursuant to § 1102 of the Bankruptcy Code, the Office of the United States Trustee will appoint one or more official committees (collectively,

the “Committees”) and that those Committees will retain counsel and other professionals (collectively, the “Committee Professionals”).

**The Procedures for Interim Compensation of Professionals**

12. The Debtors submit that, in a case of this magnitude, it is both necessary and proper to establish a uniform monthly compensation procedure for the Debtors’ Professionals and the Committee Professionals (collectively, the “Professionals”).

13. The Debtors, in consultation with the Office of the United States Trustee, have developed a proposed interim compensation procedure which the Debtors and the Office of the United States Trustee believe is fair to the Professionals, orderly for the Debtors, and will facilitate appropriate supervision and oversight by the Office of the United States Trustee and the Court.

14. The proposed monthly procedures would require the Professionals to present to the Debtors, the Office of the United States Trustee, and counsel for each of the Committees a detailed statement of services rendered (the “Fees”) and expenses incurred (the “Expenses”) by the Professional for the prior month. If no timely objection to such statements is made by the Debtors, any of the Committees or the Office of the United States Trustee, the Debtors would pay the fees incurred for the month, less a twenty percent (20%) holdback, and one-hundred percent (100%) of the expenses for the month to the applicable Professionals. All payments would be subject to the Court’s subsequent approval as part of the interim fee application process, occurring approximately every 120 days, and the final fee application process at the end of the above-captioned bankruptcy cases (the “Cases”). The specific details of this procedure are set forth in detail in the proposed form of order attached hereto.

### **Authority to Establish Interim Compensation Procedures**

15. Section 328 of the Bankruptcy Code authorizes the employment of professionals “on any reasonable terms and conditions of employment, including a retainer.” 11 U.S.C. § 328. Section 330 of the Bankruptcy Code authorizes payment to such professionals of “reasonable compensation for actual, necessary services rendered” and “reimbursement for actual, necessary expenses.” 11 U.S.C. § 330. Although the ultimate allowance of professional compensation is governed by section 330, section 331 of the Bankruptcy Code expressly allows courts to authorize, prior to final allowance of compensation or expense reimbursements, interim payments to professionals every 120 days, or more often, including on a monthly basis where warranted. 11 U.S.C. § 331<sup>1</sup>; In re Bennett Funding Group, Inc., 213 B.R. 227, 231 (Bankr. N.D.N.Y. 1997) (authorizing monthly payment of professional fees); In re Kaiser Steel Corp., 74 B.R. 885, 892 (Bankr. D. Colo. 1987) (same); In re Int’l. Horizons, Inc., 10 B.R. 895, 897 (Bankr. N.D. Ga. 1981) (same).

16. Where chapter 11 cases are as large and complex as these Cases, Congress intended that courts would be inclined to establish procedures to compensate professionals more frequently so that unpaid professional fees would not amount to substantial debts owed by the debtors’ estates to the professionals retained in the case.

(1) Section 331 permits trustees and professional persons to apply to the court not more than once every 120 days for interim

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<sup>1</sup> Section 331 of the Bankruptcy Code provides, in relevant part, as follows:

A trustee, an examiner, a debtor’s attorney, or any professional person employed under section 327 or 1103 of this title may apply to the Court not more than once every 120 days after an order for relief in a case under this title, *or more often if the court permits*, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. . . .

11 U.S.C. §331 (emphasis added).

compensation and reimbursement payments. The court may permit more frequent applications if the circumstances warrant, such as in very large cases where the legal work is extensive and merits more frequent payments.

House Report No. 95-595, 5<sup>th</sup> Cong., 1<sup>st</sup> Sess. 330 (1977); Senate Report No. 95-989, 95<sup>th</sup> Cong., 2d Sess. 41-2 (1978).

17. Section 331 of the Bankruptcy Code requires no specific procedures for professionals to obtain interim payments of compensation or expense reimbursement, other than providing that relief will be granted “after notice and a hearing.” 11 U.S.C. § 331. Section 102(1) of the Bankruptcy Code defines “after notice and a hearing” broadly to mean such notice and opportunity for a hearing “as is appropriate in the particular circumstances.” 11 U.S.C. § 102(1). Section 102(1) also states that in Title 11 the phrase “after notice and a hearing ...authorizes an act without an actual hearing” in certain circumstances, as long as “notice is given properly.” 11 U.S.C. § 102(1). Because section 331 requires only notice and a hearing, and that phrase is broadly defined by section 102(1), the Bankruptcy Code grants the Court broad discretion to approve procedures for monthly payments to professionals.<sup>2</sup> The Court is further empowered under section 105(a) of the Bankruptcy Code to establish procedures for monthly payments to professionals. Section 105(a) provides:

(1) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary

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<sup>2</sup> The Debtors also submit that the requested procedures are consistent with Rule 2016 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Rule 2016-1 of the Local Bankruptcy Rules of the United States Bankruptcy Court for the District of Maryland (the “Local Rules”). Bankruptcy Rule 2016 and Local Rule 2016-1, relating to fee applications made to the Court, do not prohibit the Court from establishing supplemental procedures for payments to professionals. The procedures requested herein contemplate that each professional must comply with the requirements of Bankruptcy Rule 2016 and Local Rule 2016-1 in addition to the procedures set forth herein.

or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

18. Many courts have established procedures similar to those proposed herein for compensating and reimbursing court-approved professionals in large chapter 11 cases so as to avoid forcing professionals to fund the reorganization case. See e.g., In re Sunterra, Case Nos. 00-5-6931-JS through 00-5-6967-JS, and 00-5-8313-JS, and 00-6-3718-JS, (Bankr. D. Md. May 31, 2000); In re Creditrust, Case No. 00-5-7812-JS, (Bankr. D. Md. June 21, 2000); Bennett Funding Group, 213 B.R. at 231; United States Trustee v. Knudsen (In re Knudsen), 84 B.R. 668, 672 (9<sup>th</sup> Cir. B.A.P. 1988) (establishing procedures for monthly payment of professionals fees); Kaiser Steel, 74 B.R. at 892 (same); International Horizons, 10 B.R. at 897; In re BCE West, L.P. et al, Case Nos. 98-12547 through 98-12570-PHX-CGC (Bankr. D. Az. 1998); In re Criimi Mae, Inc. et al., Case No. 98-23115-DK, (Bankr. D. Md. September 17, 1999); In re Merry-Go-Round, Inc. et al., Case Nos. 94-50161-SD through 94-50163-SD and 94-53774-SD, (Bankr. D. Md. March 28, 1996).

19. Appropriate factors to consider in determining whether to establish procedures for monthly payments to the Professionals in these Cases include:

- (a) The case is an unusually large one in which an exceptionally large amount of fees are expected to accrue each month;
- (b) The court is convinced that waiting an extended period for payment would place an undue hardship on counsel;
- (c) The court is satisfied that counsel can respond to any reassessment in one or more of the ways listed above [sic]; and
- (d) The fee retainer procedure is, itself, the subject of a proper notice prior to any payment thereunder.

Knudsen, 84 B.R. at 672. The Debtors submit that the procedures sought herein are appropriate in light of the foregoing Knudsen factors.

20. The first Knudsen factor is satisfied because the Debtors' cases are unusually large and complex. Additionally, the Debtors have outstanding public bond issuances in the principal amount of \$115 million and such status requires the Debtors to obtain specialized legal, accounting and financial assistance in the ordinary course of their business as well as in these Cases. The Debtors' reorganization will require the Professionals to render significant services each month. The Debtors submit that the Cases are sufficiently large and complex to warrant establishment of procedures for monthly payment of professionals.

21. The second Knudsen factor is satisfied because the Professionals may be subject to undue hardships due to delays in payment of compensation and expense reimbursements. Requiring the Professionals to wait as long as six months for each interim fee application to be approved before they may be paid for their services may place an undue hardship on the Professionals. Taking into consideration the Debtors' ability to pay, it is unnecessary to force the Professionals to partially finance the Debtors' reorganization. For this very reason, many courts have allowed payments to professionals to be made more frequently than every 120 days. See Bennett Funding Group, 213 B.R. at 233 (establishing procedures for monthly payment of professional fees prior to approval of fee applications); Knudsen at 672 (same); Kaiser Steel Corp., 74 B.R. at 892 (same); In re International Horizons Inc., 10 B.R. 895, (Bankr. N.D. Ga. 1981) (approving interim compensation of fees and establishing monthly procedures for payment of fees).

22. Also, in order to encourage experienced and skilled counsel to represent debtors in chapter 11 cases, Congress has declared its intention to "compensate attorneys and other



professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11.” Cong. Rec. H 11, 091-2 (Sept. 28, 1978); S 17, 408 (Oct. 6, 1978) (reprinted in Lawrence P. King, Collier Pamphlet Edition Bankruptcy Code, Part I, 193 (1998)). Because professionals in non-bankruptcy cases are ordinarily compensated on a monthly basis, six-month delays deprive the Professionals retained in the Cases from receiving compensation at the same rate as professionals in non-bankruptcy cases. Although the delay of payments made every 120 days or so would not create significant hardship in cases where the amounts of fees are small, six month delays in payment of the fees likely in the Debtors’ cases would subject the Professionals to unwarranted hardship inconsistent with the expressed intent of Congress in enacting section 331 of the Bankruptcy Code. Based upon the foregoing, it is submitted that payment of Fees and Expenses on other than a monthly basis may create an undue hardship for the Professionals.

23. Upon the Court’s approval of interim fee applications, the Debtors will have the authority to make full payments of Fees. Monthly payment of Fees and any objections thereto, shall be without prejudice to interim allowance of fees. All interim awards of compensation and expense reimbursements will be subject to revision and/or disgorgement upon the Court’s review of final fee applications. The Debtors submit that such procedures ensure that all Professionals can respond to any reassessment of fees after monthly payments have been made.

24. The third Knudsen factor is satisfied because both WF&G and WT&P are large, reputable firms, each with a strong financial position that makes it certain that any reassessment can be repaid to the estates should it become necessary to do so. See Knudsen at 672. Further, due to the size of these bankruptcy cases, any Committees duly appointed are also likely to hire large, reputable firms with the financial ability to repay any monthly fees should this become

necessary. Accordingly, the Court can feel comfortable that any fees paid to Professionals, but ultimately not allowed, can be recovered by the Estates should this become necessary.

25. The fourth Knudsen factor is satisfied because the Debtors have provided notice of this Motion to the Office of the United States Trustee, the Debtors' thirty largest creditors, the Debtors' pre-petition secured creditors, the Debtors' post-petition financing lender, and all parties who have requested such notice under Bankruptcy Rule 2002. Moreover, the proposed Order provides that any party in interest may move to modify the procedure at any time. The Debtors submit that such notice, when coupled with the right to move for modification later, is sufficient to allow the Court to approve the requested procedures for payment of the Professionals.

26. Finally, the establishment of procedures for monthly payments to the Professionals in these Cases will not prejudice the other creditors of these Debtors' estates (the "Estates") because the Debtors will have sufficient cash flow to pay the Professionals and operate their businesses throughout the administration of the Cases. Accordingly, monthly payment to the Professionals would not unduly deplete the Estates nor are they expected to affect eventual distributions to creditors under a plan of reorganization.

27. In sum, the requested procedures should be implemented because (a) the Knudsen factors have been met, and (b) monthly payments would not prejudice any party in interest. For all of the foregoing reasons, it is submitted that it will be appropriate and in the best interests of the Debtors, their Estates, and their creditors for the Court to approve the proposed procedures for compensation and reimbursement of Professionals.

**Conclusion**

WHEREFORE, the Debtors request that the Court (i) enter an order substantially similar to the attached proposed order establishing procedures for interim compensation and reimbursement of expenses to the Professionals on a monthly basis, and (ii) grant such other and further relief as is just and proper.

WILLKIE FARR & GALLAGHER

Alan Lipkin, Esquire

Steven Wilamowsky, Esquire

Carol Lynn H.G. Pedreira, Esquire

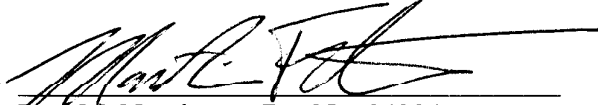
787 Seventh Avenue

New York, New York 10019-6099

(212) 728-8000

and

WHITEFORD, TAYLOR & PRESTON L.L.P.

A handwritten signature in black ink, appearing to read "Paul M. Nussbaum", is written over a horizontal line.

Paul M. Nussbaum, Bar No. 04394

Martin T. Fletcher, Bar No. 07608

Seven Saint Paul Street, Suite 1400

Baltimore, Maryland 21202

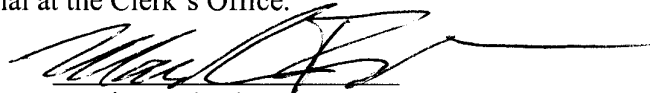
(410) 347-8700

Co-Counsel for the Debtors,

Frank's Nursery & Crafts, Inc., et al.

**CERTIFICATE OF SERVICE**

I certify that on this 19<sup>th</sup> day of February, 2001, a copy of the foregoing pleading was sent by the means indicated and to the parties identified on the Omnibus Certificate of Service filed concurrently with this pleading. In order to expedite the copying and transmittal of pleadings to parties in interest, a copy of the Omnibus Certificate of Service was not transmitted with the pleading. Any party desiring a copy of the Omnibus Certificate of Service may contact the undersigned or may review the original at the Clerk's Office.

  
Martin T. Fletcher

# **Exhibit A**

Date

United States Trustee  
Debtors' Counsel  
Committee Counsel

**Re: In re Franks Nursery & Crafts, et al.  
Case Number 01-  
Jointly Administered**

Ladies and Gentlemen:

**STATEMENT OF SERVICES RENDERED AND EXPENSES INCURRED BY  
COUNSEL FOR \_\_\_\_\_  
THE PERIOD MARCH 1, 2001 THROUGH MARCH 31, 2001**

In accordance with the Administrative Order Pursuant to 11 U.S.C. §§ 105(a), 328 and 331 Establishing Procedures for Interim Compensation and Reimbursement of Professionals (the "Administrative Order") entered by the Court on February \_\_\_\_, 2001, \_\_\_\_\_ ("FIRM"), counsel to the \_\_\_\_\_, (the "\_\_\_\_"), submits this Statement of Services Rendered and Expenses Incurred (the "Statement") for the period March 1, 2001 through March 31, 2001 (the "Statement Period").

**I. The Itemization Of Services Rendered By FIRM:**

1. The hours spent in this case during the Statement Period for which FIRM seeks compensation, the hourly rate for each attorney and legal assistant and the resulting fees are as follows:

Name	Position	Hours	Hourly Rate	Fees Earned
	Partner			
	Associate			
	Paralegal			
<b>TOTAL</b>				

2. The time records of FIRM submitted herewith, and incorporated herein as **Exhibits 1 through 13**, consist of a daily breakdown of the time spent by each person on each day and of the disbursements during the time period in question.

3. The blended hourly rate for all services during this period is \_\_\_\_\_ per hour.<sup>1</sup>

**II. THE ITEMIZATION OF SERVICES RENDERED AND DISBURSEMENTS MADE BY CATEGORY**

4. The following itemization breaks down the services rendered by FIRM by the service categories indicated and provides an aggregation of disbursements by form of disbursement.

**A. Services Rendered.**

5. The following services were rendered in the following service categories:

<b>Service Category</b>	<b>Hours</b>	<b>Fees Earned</b>
1. General Case Administration		
2. Cash Collateral/DIP Lending		
3. Executory Contracts and Leases		
4. Plan and Disclosure Statement		
5. Lift Stay Motions		
6. Claims Review and Objections		
7. Professionals		
8. Avoidance Actions		
9. Sale of Assets		
10. 2004 Motions/Examinations		
11. Employees, Officers, Directors & Related Claims, Contracts, Litigation		
12. Regulatory/Securities		
13. Schedules, Statements and Monthly Reports		
<b>TOTAL</b>		

<sup>1</sup> The blended hourly billing rate of \$\_\_\_\_\_ per hour is derived by dividing the total fees of \$\_\_\_\_\_ by the total hours of \_\_\_\_\_.

A detailed itemization of the services rendered in each of the above Service Categories is set forth in **Exhibits 1 through 13** respectively.

**B. Disbursements Made.**

6. The disbursements of FIRM for the instant Application are as follows:

<b>TOTAL</b>	

**C. Total Services Rendered and Disbursements.**

7. The total services rendered and disbursements made, after adjusting for write offs, are as follows:

Total Services	
Total Disbursements	
<b>TOTAL</b>	

**D. Billing Judgment Adjustments.**

8. In the exercise of billing judgment, FIRM has written off a total of \$\_\_\_\_\_ for the Statement Period so that the actual fee requested above has already been reduced by approximately \_\_\_\_ (\_\_\_\_%) percent<sup>2</sup> from that which FIRM might otherwise have requested.

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<sup>2</sup> The write-off percentage of \_\_\_\_ percent (\_\_\_\_%) is calculated by dividing \$\_\_\_\_\_ by the sum of \$\_\_\_\_\_ and \$\_\_\_\_\_ (i.e. \$\_\_\_\_\_ ÷ (\_\_\_\_\_ + \$\_\_\_\_\_) = .\_\_\_\_\_).



**E. Amount Payable After Holdback.**

9. The amount payable for this Statement Period, after adjusting for the twenty percent (20%) holdback, is \$ \_\_\_\_\_.<sup>3</sup>

10. The Firm respectfully requests that said amount be paid pursuant to the Court's Administrative Order.

\_\_\_\_\_  
Attorney, Esq.

FIRM

Firm Address

(---) --- -----

Attorneys for \_\_\_\_\_

1332115

<sup>3</sup> The amount payable of \$ \_\_\_\_\_ is calculated by multiplying \$ \_\_\_\_\_ by eighty percent (80%) and then adding the expenses of \$ \_\_\_\_\_ (i.e. (\$ \_\_\_\_\_ X .80) + \$ \_\_\_\_\_ = \$ \_\_\_\_\_).